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In the Supreme Court of the United States

October Term, 1957

No. 427

NORTH CENTRAL PUBLIC SERVICE CO., ET AL.,
PETITIONERS

v.

NORTHERN NATURAL GAS COMPANY, AND
FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. D. 96-106) is reported at 245 F. 2d 447.

JURISDICTION

The order of the Court of Appeals was entered on May 14, 1957 (Pet. App. D. 106). A petition for rehearing, timely filed, was denied on June 24, 1957 (Pet. App. E. 107). The petition for a writ of cer-

tiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a fund accumulated under a stay pending judicial review of a Federal Power Commission order reducing the rates charged by a natural gas company was properly ordered distributed to the ultimate consumers of the gas rather than to the local distributing companies which had purchased the gas from the natural gas company.

STATEMENT

On May 20, 1955, the Federal Power Commission ordered Northern Natural Gas Company, a natural-gas company under the Natural Gas Act, to establish certain zone rate differentials for its sales of natural gas subject to the Commission's jurisdiction (Pet. App. A. 24-70). This order was entered in a proceeding (Docket No. G-2217) under Section 4(e) of the Natural Gas Act to consider a general rate increase proposed by Northern Natural (Pet. App. A. 27). Certain customers of Northern Natural intervened and complained that the pipeline's existing structure of uniform system-wide rates was unduly discriminatory as to them in violation of Section 4(a) of the Act (Pet. App. A. 28). On January 28, 1954, the Commission approved a Stipulation for Settlement, agreed to by all the parties, which settled all the issues raised except that of zone rate differentials and reserved that question for further hearings (Pet. App. A. 27-28). In accordance with the approved

Stipulation, Northern filed revised rate schedules (with uniform rates) which became effective as of December 27, 1953 (Pet. App. A. 29). After further hearings on the reserved question, the Commission issued the order of May 20, 1955, requiring Northern Natural to establish rate differentials in three prescribed zones (Pet. App. A. 24-70).

In the meantime, Northern Natural, on July 2, 1954, had filed new proposed rate schedules seeking to increase its rates by an additional $8,128,405 annually (Pet. App. A. 59). The Commission instituted a new proceeding on these further rate increases (Docket No. G-2505) in which it suspended the proposed increases until December 27, 1954, when the proposed increases became effective, subject to such refunds as might thereafter be ordered by the Commission (Pet. App. A. 59-60). Pursuant to the Commission's order directing zone rate differentials in Docket No. G-2217, Northern Natural, on July 5, 1955, filed rate schedules for the three zones (Pet. App. C. 80). The Commission permitted these revised schedules to become effective as of June 27, 1955, subject to refund, in substitution of the rate schedules originally filed in Docket No. G-2505 which themselves had been in effect, subject to refund, since December 27, 1954 (Pet. App. C. 80).

On September 9, 1955, Northern Natural sought review in the court below of the Commission's order requiring zone rates (Pet. App. C. 80). Ancillary to its petition for review, Northern Natural sought a partial stay of the Commission's order, requesting the court below to permit it to collect in Zones 1 and

2 the uniform rate which had been in effect prior to its filing of zone rates while, at the same time, continuing to collect the higher zone rate in Zone 3. In granting the partial stay as requested, the Court of Appeals stressed that the stay would provide the best means of protecting the ultimate consumers (Pet. App. B. 73-74):

> It appears from the information before us on the hearing that the distributors in Zones 1 and 2 (with perhaps a local exception) are going to continue to charge their consumers the same rate as before, until the present review proceeding is disposed of, without giving them the benefit of the rate reduction which would accrue to the distributors, if Northern Natural's request for a stay should be denied. Thus, the four intervener-distributors who have appeared in resistance to Northern Natural's request for a stay, have apparently to date made no reduction to their consumers, nor have they urged any desire or intention on their part to do so as a basis for their objection to the granting of the stay. It is perhaps only natural that, even without a stay, any distributor in Zones 1 and 2 would seek to safeguard itself against the possibility of being held liable to Northern Natural for any additional amount over the zone rate, in case the Commission's order should be reversed.
>
> But in case the Commission's order should be affirmed, the Court, without a stay having been granted, will be in no position to protect ultimate consumers. If a stay is granted, Northern Natural can be required by us to make refund to such ultimate consumers. • • •

The Court of Appeals subsequently affirmed the Commission's order in all respects (*Interstate Power Company* v. *Federal Power Commission*, 236 F. 2d 372) and this Court denied certiorari. 352 U.S. 967.

Following the denial of certiorari, Northern Natural, on February 17, 1957, moved the court below for an order directing the distribution of the $1,561,887.13 collected under the stay order from its customers in Zones 1 and 2. (Pet. App D. 97-98) Pointing out that it had granted the stay in order to protect the ultimate consumers, but that it had made provision for refund to a distributing company which during the stay period reduced its rates pursuant to and in an amount equivalent to the reduction accruing to it under the stayed order of the Commission, the court below directed Northern Natural to make direct unconditional refunds to a number of distributing companies which, being municipal corporations with a public status and capacity, would, in any case, be operated for the benefit of ultimate consumers (Pet. App. D. 99-100). As to the other purchasers from Northern Natural in these zones, including petitioners here, the court rejected their claims to the refund and, in accordance with the terms of its stay order, directed that the monies be refunded to the ultimate consumers (Pet. App. D. 100-101).

ARGUMENT

1. Petitioners' primary contention is that the actions of the court below, in refusing to distribute the refund to them and instead directing that the monies be distributed to their ultimate consumers, is in con-

flict with *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138 (Pet. 13-15). In *Central States*, according to petitioners, this Court had held that, in distributing a fund accumulated under a stay such as is here involved, a court of appeals has no choice but to distribute the money to the local distributing company, rather than its ultimate consumers, since "that court had no power to fix rates—that being a legislative function of the State of Iowa" (see Pet. 14).

In so urging, however, petitioners fail to take into account the fact that *Central States* was sharply limited by this Court in its later decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, a case not mentioned by petitioners. *Interstate*, which we believe is controlling, also involved the proper disposition of a fund accumulated under a stay issued by a court of appeals pending review of a Commission order reducing rates for wholesale sales of natural gas. In that case, the Court of Appeals, relying on *Central States*, had ordered distribution of the accumulated funds to the purchasing companies. This Court, however, reversed and while it commented in passing that, unlike *Central States*, the purchasing companies involved were themselves pipeline companies subject to the Commission's jurisdiction and that therefore their entitlement to the refund was a matter of federal law (336 U.S. at 580-581), it went on to recognize that the purchasing pipelines in turn resell to distributing companies for resale to ultimate consumers. In resolving the conflicting claims, this Court

noted that in ordering distribution of such a fund a court of appeals is not fixing rates, but rather is discharging its

> * * * responsibility to protect all the interests whom its injunction may affect. * * * It assumes the duty to make disposition of the fund in accord with equitable principles. * * * If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it. * * * [*Id.* at 582-583.]

Consequently, this Court ruled that, in passing on the claims of a distributing company *vis a vis* its ultimate consumer, the court of appeals should utilize the available sources of local law, including information from state regulatory agencies (*id.* at 583-584), and that (*id.* at 584):

> * * * the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into fed-

eral or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process.

2. The court below here properly exercised its informed judgment when, in seeking "to undo the wrong which its process caused" (*Interstate* at 584), it determined that, in the circumstances of this case, its stay resulted in a loss to the ultimate consumers of petitioners, rather than to petitioners. Petitioners do not claim that the stay caused them a loss; all they claim is that they did not seek a rate increase as a result of the increased cost of natural gas. But, as this Court stated with reference to the purchasing pipelines involved in *Interstate* (at 581-582), "a court would not be warranted in assuming that the rates which have been charged are so low as to be unreasonable. No such presumption attends rates which have been fixed pursuant to rate orders of the commission. Nor can we make any such presumption as respects rates fixed by the utilities themselves without the compulsion of a rate order. For experience does not indicate that utilities are wont to charge themselves out of business."

This is fully applicable here. Petitioners' costs of the purchased gas are included in the rates charged to the ultimate consumers and so passed on to them. Petitioners are constitutionally entitled to charge rates which reimburse them for their costs of oper-

ation and in addition yield a fair return on their investment. If, on the basis of their costs, petitioners failed to earn a fair return, the usual machinery for seeking an appropriate rate increase was available to them; the court's stay in no way disabled them from invoking that machinery. Presumptively, petitioners' failure to seek a rate increase during the stay period indicates that they in fact were earning a fair return. This presumption is strongly buttressed by the fact that the court advised petitioners, at the outset, of its intention to distribute the fund which would accumulate under the stay to the ultimate consumers unless the rate decrease which was being stayed was in the interim passed on to them (Pet. App. B. 73-74). It is conceded here by petitioners that they did not pass the ordered decrease on to their ultimate consumers.

Moreover, even if petitioners did not earn a fair return during the stay period, that failure was not a result of the stay. It is only those consequences which resulted from the stay which the court should correct in distributing the accumulated fund. To bestow upon the petitioners the fund accumulated pursuant to the stay in addition to the fair return which they are entitled to seek by other means would be to give them an unmerited windfall. In this connection, notice should be taken of petitioners' claim of entitlement to refund here on the ground that, as a result of a further increase in rates filed by Northern Natural, they paid during the period of the stay rates even higher than those set by the Commission in the zone rate proceeding. These

higher rates, however, were permitted by the Commission to become effective as of December 27, 1954, subject to refund pending final Commission action thereon. Not only did petitioners, nearly a year prior to the stay order below (dated November 18, 1955), deliberately decide not to seek a rate increase based on this increase, but the increase ultimately approved by the Commission was, as anticipated by petitioners, substantially less than that proposed by Northern Natural and the Commission has directed appropriate refunds of the excess to be paid thereunder. 17 F.P.C. 770. Since petitioners' decision not to pass on this increase to its ultimate consumers was made prior to and independently of the stay order here, and this increase was in no way involved in the proceeding below, the court below properly ignored it in undoing "the wrong which *its* process caused [italics added]."

Unlike petitioners, their ultimate consumers did suffer loss as a result of the stay. In granting the stay, the court below acted in part because of its understanding that no voluntary reduction in rates predicated on reduced cost stemming from the rate reduction order would be made until final court review of the zone order. Nor were the local regulatory agencies or the consumers themselves in a position to seek a rate reduction on the basis of the Commission's rate reduction order, for until the litigation was terminated, it was uncertain whether the distributing company's cost of purchased gas would be so reduced. "[A] federal rate reduction order cannot be utilized before state regulatory agencies where the federal reduction order has been stayed by a

federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies." *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138, at 149 (dissenting opinion). Accordingly, since the court in staying the Commission's order prevented transmission of these benefits to the ultimate consumers, it properly ordered the distribution of the fund accumulated under the stay to the ultimate consumers as the persons to whom the stay caused a loss.

3. The action of the court below does not conflict with that taken by courts of appeals in the other cases cited by petitioners (Pet. 15-16). In *Northern Natural Gas Co.* v. *Federal Power Commission*, 215 F. 2d 892 (C.A. 8), the court distributed a fund collected by Northern Natural from various distributors under an order of the court staying the Commission's order disallowing certain items of a rate increase schedule filed by Northern Natural. However, the stay there had been issued in the express anticipation that it would be operative for such a short period of time that the purchasing companies generally would not have an opportunity to seek rate increases based on the stay. It was in the light of that circumstance that the court held that the distributing companies who had made no increases to their customers during the stay period were entitled to unconditional refund orders, but those who had passed on the rate increase to their ultimate customers

were directed to make refunds to them.[1] Thus, the court there, the same panel of the Eighth Circuit as here, was concerned with correcting the wrong resulting from its stay, and the difference in the distribution of the refund flowed entirely from the difference in the factual situation.

In *Cities Service Gas Co.* v. *Federal Power Commission*, 176 F. 2d 548 (C.A. 10), the Tenth Circuit, relying on this Court's statement in *Interstate* that the federal court might hold funds if clear and speedy state remedies are available, exercised its discretion by ruling that it would retain the fund accumulated under its stay order pending the outcome of the then well-advanced state court litigation between the ultimate consumers and the local distributor. Thus, in *Cities Service*, the Tenth Circuit, as the court below, exercised its informed judgment as to the most practical method of obtaining an equitable and expeditious distribution of the accumulated fund. Again, the different procedure adopted by the Tenth Circuit was the result of a different factual situation; in the present case there was no state litigation pending to which the Court of Appeals could have turned.

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[1] To assure that the distributing companies did not receive an unwarranted windfall, the Eighth Circuit, in granting the stay, reserved jurisdiction.

> * * * to impose conditions upon the the acceptance of such funds by any utility distributing company as shall be just and equitable in relation to its consumer customers; such as requiring it as a condition of acceptance and receipt to make refund to its customers, with reasonable allowance [to it] out of the funds and interest so received by it, to cover the cost of such distribution. (215 F. 2d at 897)

Finally, in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 181 F. 2d 833 (C.A. 5), the Fifth Circuit, after being reversed by this Court (see 336 U.S. 577), undertook, in accordance with this Court's directions, to examine the various conflicting claims to accumulated funds regardless of whether the rates charged the claimants were in the first instance subject to the Commission's jurisdiction, and, based on that examination, the Court directed the distribution of the accumulated fund to the public utility companies for redistribution to their customers of all excess charges not already returned in lower rates (see 181 F. 2d at 834). Far from conflicting, this action fully supports that of the court below. See, also, *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 203 F. 2d 219, 222 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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